IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

SUMMONS FOR JUDGMENT NO. 367 OF 2004

IN

SUMMARY SUIT NO. 3577 OF 2003

Intersil (I) P.Ltd .....Plffs.
vs.
Chippack Malaysia Son BHDS
and anr. .....Defnds.

Rohit Kapadia a/w. Birendra Saraf i/b.Crawford Bayley and Co.
for the plaintiffs.
Chirag Balsara a/w. H.W. Kane
for defendant no.1 and 2.

CORAM: S.U. KAMDAR, J.

DATE : 18th October, 2005.

P.C. :.

1. The present suit is filed for the recovery of U.S. Dollar 35,64,000 as per the particulars of claim being Ex.J to the plaint.

2. It is the case of the plaintiff that a contract was entered into between the parties for the purpose of providing the assembly and/or test of semiconductor devices and for providing the parts for assembly line by the plaintiff to the defendant herein. The said contract under Clause 2 inter-alia provided that the contract will be in operation from 1.4.98 to 31.3.00 i.e. for a period of two years. The said contract has expired on 31.3.2000. It is the case of the plaintiff that under a contract it was agreed that various assembly parts will be supplied with a condition that the defendant will be liable for payment of U.S. Dollar 9200 as a minimum guaranteed amount. It is the case of the plaintiff that though the said contract has come to an end by letter dated 30.5.00 the interim arrangement was arrived in which it was inter-alia agreed that a term of minimum guaranteed price of U.S. Dollar 9200 payable by the defendant to the plaintiff for the material supply will continue. Thus 9200 U.S. Dollar was the lumpsum minimum assured price which was payable by the defendant to the plaintiff

irrespective of the fact that whether the goods are delivered or not by the defendant to the plaintiff.

3. It is the case of the plaintiff that after the said arrangement was arrived at on 30.5.2000 the defendants have paid the amount upto 30.8.2001 but suddenly the defendant reduce the payment of the minimum price from 9200 U.S. dollar to 5900 U.S. Dollar by reducing the payment of U.S. Dollar 3,300 inrespect of one of the parts namely TO 39 Commercial- w/o B/B and with B/B. The present suit is filed for the aforesaid balance amount of 3300 U.S. Dollar as the minimum lumpsum price payable as part and parcel of 9200 U.S. Dollar i.e. between the period from 29.9.2001 to 13.3.2002 and the claim is made of 79200 U.S. Dollar equivalent to Rs.35,64,000/-.

4. Learned counsel appearing for the defendant has raised three fold defences. Firstly it is contended that there was no final arrangement arrived at between the parties for making payment of 9200 U.S. Dollar particularly by way of a

written contract. It was contended that the said letter dated 30.5.2000 provides that the contract is to be reviewed and it does not create a fresh contract after expiry of earlier contract on 31.3.2000. It has been further contended that in the light of various correspondence particularly the letter dated 3.8.2001 it is clear that there is no final and concluded contract for payment of the said minimum guaranteed amount of U.S. Dollar 9200. In so far this contention is concerned I am not inclined to accept the same. In my opinion the letter dated 30.5.00 addressed by the defendant no.1 is clearly a written contract between the parties and a contract has been arrived at to pay 9200 U.S. Dollar pending the new agreement is negotiated between the parties. The correspondence which has been relied upon by the learned counsel for the defendant nowhere says that this arrangement arrived at by letter dated 30.5.2000 has been given a go-bye and not adhered to between the parties.

5. The next contention raised by the learned

counsel for the defend that in any event the said claim is for liquidated damages. He has relied upon the judgment of the Supreme Court in the case of of Fateh Chand vs. Balkishan Das reported in AIR 1963 S.C. 1405 In my opinion the present judgment has no application to the facts of the present case because the amount is guaranteed by the defendant no.1 as a minimum guaranteed amount. In the light of the judgment of the apex court in the case of ONGC vs. State bank of India reported in AIR 2000 SC 2548 in which it has been inter-alia held that even inrespect of liquidated damages once the amount is guaranteed, then in that event the suit is maintainable under O.37 R.2 of the CPC. I find no merits in the aforesaid contention.

6. However it is further the case of the defendant that from 9200 U.S. Dollar and for a subsequent period 5900 U.S. Dollar has been paid by the 2nd defendant and not by the defendant no.1. This aspect of the matter is not seriously disputed by the plaintiff. However the case of the plaintiff that the business of the defendant no.1

has been taken over by the 2nd defendant and therefore the defendant no.2 has paid the aforesaid amount. In the present suit both the defendant no.1 and 2 are sued. Defendant no.1 is sued on a written contract reflected by a letter dated 30.5.00 whereas the 2nd defendant is sued because he has paid the price of minimum assured amount as per letter dated 30.5.2000. In my opinion even if it is considered that the letter dated 30.5.2000 constituted written contract between the parties but in absence of the said documents duly signed by the 2nd defendant merely by making payment it is not possible to hold that there is a written contract between the plaintiff and the 2nd defendant. In so far as the plaintiffs are concerned they have after the letter dated 30.5.2000 has accepted the payment from defendant no.2 and not from defendant no.1. Thus payments are not made under the letter dated 30.5.2001 and therefore it is not possible to maintain suit under O.37 R.2 on the said letter 30.5.2000.

7. However in the light of the view I have taken

that suit is not maintainable against the 2nd defendant because the 2nd defendant is not a party to the arrangement reflected in letter dated 30.5.2000 and the defendant no.1 has not paid the amount as per the letter dated 30.5.2000 but it is the 2nd defendant who has admittedly paid the amount. In my view triable issue arises as to the priority of contract in the present case and therefore unconditional leave to defend is granted.

8. Suit is transferred to the list of Commercial Causes. Written statement or points of defence to be filed four weeks from today. Affidavits, list of documents to be filed within four weeks thereafter. Inspection within four weeks thereafter. Suit to be on board of the learned Judge taking Commercial Causes.

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